

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: February 16, 2016)

RODNEY J. LEBRECQUE :
V. :
STATE OF RHODE ISLAND :
COASTAL RESOURCES :
MANAGEMENT COUNCIL, :
ANNE MAXWELL LIVINGSTON, :
in her capacity as CHAIR of the :
COASTAL RESOURCES :
MANAGEMENT COUNCIL; :
GROVER J. FUGATE, in his capacity :
as EXECUTIVE DIRECTOR of the :
COASTAL RESOURCES :
MANAGEMENT COUNCIL; :
PAUL MERCURIO, and CAROL :
MERCURIO :

C.A. NO. PC-2014-2508

DECISION

PROCACCINI, J. Before this Court is the appeal of Rodney J. Lebreccque (Mr. Lebreccque) from a final decision of the State of Rhode Island Coastal Resources Management Council (the Council) approving an application by Appellees Paul and Carol Mercurio (Mercurios) to construct a dwelling on their lot located on Glenwood Avenue in the Town of Narragansett, Rhode Island. Jurisdiction is pursuant to G.L. 1956 § 42-35-15.

I

Facts and Travel

In 1997, the Mercurios purchased a substandard, undeveloped lot (the Property) in a residential neighborhood located on Glenwood Avenue in the Town of Narragansett, Rhode

Island. The Property contains approximately 4760 square feet of land.<sup>1</sup> A damaged revetment, or retaining wall, forms the eastern boundary of the Property along the Rhode Island Sound. Glenwood Avenue borders the Property to the west. The Property is located within 200 feet of the Rhode Island shoreline and falls under the jurisdiction of the Rhode Island Coastal Resources Management Program (the CRMP). CRMP § 100.1. Pursuant to the CRMP, any residential development on the Property is subject to a twenty-five foot coastal buffer zone<sup>2</sup> (the Buffer Zone) as well as a fifty foot minimum construction setback (the Setback). CRMP §§ 140 and 150. Additionally, the Property is located within a “V19 Flood Zone,” or high hazard flood area.

In 2003, the Mercurios applied to the Council for a Preliminary Determination to ascertain whether they could construct a single-family twenty-foot-by-thirty-two-foot residence on the lot (the Project). Council staff (the Staff) recommended denying the Project. The Staff found that due to the small size of the Property, the Project would require “significant variances” from the CRMP Setback and Buffer Zone<sup>3</sup> as well as from the front yard setback requirements of the Town of Narragansett’s Zoning Ordinance (the Zoning Ordinance). Further, the Staff determined that because the Property is located in a V19 Flood Zone, the fifty foot Setback was particularly important.

Undeterred, the Mercurios applied to the Town of Narragansett Zoning Board (the Board) requesting a special use permit and dimensional variances. The Board denied the Mercurios’ application on the grounds that due to the Property’s small size and location in a V19 Flood

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<sup>1</sup> The Property is located in an R-10 zoning district, which requires a minimum lot size of 10,000 square feet. Despite this requirement, the Property qualifies as a substandard lot of record because it pre-existed the zoning ordinance amendment creating the R-10 zone.

<sup>2</sup> CRMP § 150 defines a coastal buffer zone as “land area adjacent to a Shoreline (Coastal) Feature that is, or will be, vegetated with native shoreline species and which acts as a natural transition zone between the coast and adjacent upland development.”

<sup>3</sup> The Staff determined that the Project required a forty-one foot Setback variance and a twenty foot Buffer Zone variance.

Zone, the proposed structure presented a hazard to surrounding properties. The Mercurios appealed the Board's decision to the Superior Court. On appeal, the Court held that the Board had exceeded its statutory authority and erroneously analyzed the application under the CRMP's variance criteria. Mercurio v. The Zoning Bd. of Review of Narragansett, No. WC 2006-0056, 2007 WL 4471143, at \*15 (R.I. Super. Nov. 20, 2007). The Court overturned the Board's decision and remanded the matter to the Board with instructions to grant the special use permit and dimensional variances. Id.

Following the appeal, the Mercurios applied to the Council seeking final approval of the Project as well as variances from the Setback and Buffer Zone (the Project Application). In addition to the Project Application, the Mercurios submitted a second application to the Council seeking approval to repair the damaged revetment on the Property (the Revetment Repair Application). For reasons not apparent in the record, approval of the Revetment Repair Application was made contingent upon the Council approving the Project Application. The Council opened a public notice and comment period and set a hearing date for the Project Application. The Staff's engineering, biology and geology departments each reviewed the Mercurios' Project Application and submitted memoranda recommending that the Council deny the Project.

The Staff Engineer concluded that the Property was too small to support the Project. He determined that in light of the Property's location in a V19 Flood Zone, the Project posed significant adverse environmental impacts to the surrounding area and would be very vulnerable during storm events. In particular, the Engineer concluded that "[t]o allow the siting of a new residence which requires the issuance of a [forty-one] foot variance . . . in such an environment would seem to be contrary to sound coastal management." Appellant's Ex. 5, at 2. Similarly,

the Staff Biologist determined that the Property was only suitable for recreational as opposed to residential use. In his report, the Staff Biologist went through each of the six variance criteria outlined in the CRMP and determined that the Project Application did not meet “the required burdens of proof for the granting of the necessary [S]etback and [B]uffer [Zone] variances.” Appellant’s Ex. 6, at 6. Likewise, the Staff Geologist recommended that the Council deny the Project Application and noted that even if the Mercurios repaired the revetment, the Property was likely to experience significant erosion and further loss of land “within the mere [eight foot] [S]etback.” Appellant’s Ex. 8, at 4.

On February 12, 2013, the Council conditionally approved the Revetment Repair Application. On January 28, 2014, the Council held a hearing on the Project Application. At the hearing, the following—Dr. David R. Carchedi (Dr. Carchedi), a civil engineer; Dr. Peter S. Rosen (Dr. Rosen), a coastal geologist; and Mr. Mercurio—all testified in support of the Project Application. The Council also heard from Mr. Lebreque, a property owner who owns a residence located directly across from the Property, who testified in opposition to the Project Application.

During the hearing, Doctors Carchedi and Rosen refuted the opinions of the Staff and testified that the Project would not pose any danger to the environment or to neighboring properties. Rather, both experts were of the opinion that the Project—coupled with the repaired revetment—would have a positive environmental impact on the Property and surrounding land. During the hearing, the Council expressed concern as to whether the repaired revetment would withstand storm surge and asked if the residence could be raised in elevation by another two or three feet above FEMA guidelines. Hr’g Tr. 50:1-4, Jan. 28, 2014. In response, Dr. Carchedi

reassured the Council that the revetment would survive a large storm event and stated that the residence could be raised. Id. at 50:5, 51:9-14, 53:10-15.

Next, Mr. Mercurio testified. In response to questions from the Council, he stated that if the Council uncoupled the Revetment Repair Application from the Project Application, he would not repair the revetment. Last, the Council heard from Mr. Lebreque, who testified that he was concerned about the Project's construction only eight feet from the shoreline. Id. at 82:13-17. Mr. Lebreque produced pictures of the Property he had taken after Hurricane Sandy, showing damage to the Property including debris in the yard of the Property and a large hole in the existing revetment. Id. at 82:18-24, 83:1-2. In response to questions from the Mercurios' attorney, Mr. Lebreque admitted that if it were constructed, the Project would affect his view of the shoreline. Id. at 91:8-10. At the end of the hearing, the Council approved the Project Application with the added condition that the residence be raised an additional two feet above FEMA requirements. Id. at 108:11-12.

On May 1, 2014, the Council issued a final written decision (the Final Decision) approving the Project Application. The Final Decision contained thirty findings of fact and three conclusions of law. In the Final Decision, the Council stated that the Staff's primary objection to the Project was the risk of erosion to the Property due to the proximity of the proposed residence to the shoreline. Final Decision, at ¶ 7. However, the Council explained that the Mercurios' experts disagreed with the Staff's findings. Id. at ¶ 15. The Council noted that Doctors Carchedi and Rosen had testified that the repaired revetment would not result in adverse environmental impacts to the shoreline. Id. at ¶¶ 16-24. Rather, Doctors Carchedi and Rosen had each testified that the Project—especially the revetment repair—would benefit the Property and surrounding area from erosion and storm surge. Id. The Council also noted that Dr. Carchedi had testified

that the variances requested were the minimum relief necessary to construct the Project. *Id.* at ¶ 17. The Council stated that its members had considered and debated the credibility of the Staff’s recommendations as well as the testimony of Dr. Carchedi and Dr. Rosen. *Id.* at ¶ 25. Ultimately, the Council concluded that based on the totality of the scientific evidence presented, the Mercurios had met the burden of proof necessary for the Council to grant the variances and approve the Project Application. *Id.* at ¶ 26.

Following the issuance of the Final Decision, Mr. Lebreque timely filed an appeal to this Court. On appeal, Mr. Lebreque argues that the Council’s decision was made upon unlawful procedure and is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Specifically, Mr. Lebreque contends that 1) the Council made insufficient findings of fact to support its decision in violation of §§ 42-35-12 and 42-35-15(g); 2) the decision was clearly erroneous because the Council disregarded the conflicting recommendations of the Staff; and 3) the Project Application did not meet the sixth element of the CRMP’s variance criteria because the Mercurios’ hardship was self-created.

## II

### Standard of Review

This Court’s review of the Council’s decision is governed by chapter 35 of title 42, entitled the Administrative Procedures Act. *See Vito v. Dep’t of Env’tl. Mgmt.*, 589 A.2d 809, 810 (R.I. 1991). Section 42-35-15(g) provides:

“The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

“(1) In violation of constitutional or statutory provisions;

- “(2) In excess of the statutory authority of the agency;
- “(3) Made upon unlawful procedure;
- “(4) Affected by other error or law;
- “(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- “(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.”

When reviewing a decision under the Administrative Procedures Act, this Court may not substitute its judgment for that of the agency on questions of fact. Johnston Ambulatory Surgical Assocs., Ltd. v. Nolan, 755 A.2d 799, 805 (R.I. 2000). The Court is limited to “an examination of the certified record to determine if there is any legally competent evidence therein to support the agency’s decision.” Barrington Sch. Comm. v. R.I. State Labor Relations Bd., 608 A.2d 1126, 1138 (R.I. 1992). Legally competent or substantial evidence is “relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means [an] amount more than a scintilla but less than a preponderance.” Caswell v. George Sherman Sand & Gravel Co., 424 A.2d 646, 647 (R.I. 1981).

However, in order for the Court to apply this deferential standard, an agency’s decision must contain sufficient findings of fact. Kaveny v. Town of Cumberland Zoning Bd. of Review, 875 A.2d 1, 7 (R.I. 2005). The Rhode Island Supreme Court has held that “[a] satisfactory factual record is not an empty requirement.” JCM, LLC v. Town of Cumberland Zoning Bd. of Review, 889 A.2d 169, 176 (R.I. 2005). The parties to the decision and the reviewing court “are entitled to know the reasons for the board’s decision in order to avoid speculation, doubt, and unnecessary delay.” Hopf v. Bd. of Review of Newport, 102 R.I. 275, 288, 230 A.2d 420, 428 (1967). As such, agencies “should make express findings of fact and should pinpoint the specific

evidence upon which they base such findings.” Id. Moreover, an agency’s factual findings must be more than “merely conclusional, and the application of the legal principles must be something more than the recital of a litany.” JCM, LLC, 889 A.2d at 176-77 (internal quotation marks omitted).

When an agency fails to make sufficient findings of fact, “the court will not search the record for supporting evidence or decide for itself what is proper in the circumstances.” Bernuth v. Zoning Bd. of Review of New Shoreham, 770 A.2d 396, 401 (R.I. 2001); see also Sakonnet Rogers, Inc. v. Coastal Res. Mgmt. Council, 536 A.2d 893, 897 (R.I. 1988) (“[E]ven if the evidence in the record, combined with the reviewing court’s understanding of the law, is enough to support the order, the court may not uphold the order unless it is sustainable on the agency’s findings and for the reasons stated by the agency.”) (internal citation omitted). Agency decisions which do not adequately set out the reasons for denying or granting relief or point out the evidence on which a decision is based are subject to remand for clarification. Hopf, 102 R.I. at 288, 230 A.2d at 428.

### **III**

#### **Analysis**

##### **Insufficient Findings of Fact**

Mr. Lebrecque argues that the Final Decision violates §§ 42-35-12 and 42-35-15(g) because the Council did not specifically address whether the Project Application met each of the six variance criteria in its findings of fact and conclusions of law. This Court agrees.

Council decisions must comply with the requirements of § 42-35-12, which provides in pertinent part that, “[a]ny final order shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a

concise and explicit statement of the underlying facts supporting the findings.” Sec. 42-35-12.

In order to grant a variance from the Setback and Buffer Zone, the Council must find that an application meets the following six criteria:

“(1) The proposed alteration conforms with applicable goals and policies of the Coastal Resources Management Program.

“(2) The proposed alteration will not result in significant adverse environmental impacts or use conflicts, including but not limited to, taking into account cumulative impacts.

“(3) Due to conditions at the site in question, the applicable standard(s) cannot be met.

“(4) The modification requested by the applicant is the minimum variance to the applicable standard(s) . . .

“(5) The requested variance to the applicable standard(s) is not due to any prior action of the applicant or the applicant’s predecessors in title. With respect to subdivisions, the Council will consider the factors as set forth in (B) below in determining the prior action of the applicant.

“(6) Due to the conditions of the site in question, the standard(s) will cause the applicant an undue hardship. In order to receive relief from an undue hardship an applicant must demonstrate *inter alia* the nature of the hardship and that the hardship is shown to be unique or particular to the site. Mere economic diminution, economic advantage, or inconvenience does not constitute a showing of undue hardship that will support the granting of a variance.” CRMP § 120(A).

In its conclusions of law, the Council stated that the “record reflects that the evidentiary burdens of proof as set forth in the Coastal Resources Management Program have been met for this project.” Final Decision, at ¶ 3. Regarding the six variance criteria, the Council’s written decision states that the Project:

“a) Does conform with the applicable goals and policies in Parts Two and Three of the CRMP;

“b) Will not result in significant adverse environmental impacts or use conflicts;

“c) That due to the conditions at the site, the applicable standard cannot be met;

“d) The modification requested by the applicants is the minimum variance to the applicable standards necessary to allow a reasonable alteration or use of the site;

“e) The requested variance to the applicable standard is not due to any prior action of the applicants or the applicants’ predecessor in title;

“f) Due to the conditions of the site in question the standard will cause the applicants undue hardship.” Id. at ¶ 27(a)-(f).

However, the Final Decision reflects that the Council only made factual findings concerning two of the six variance criteria. In the Final Decision, the Council discussed the conflicting opinions of the Staff and the Mercurios’ experts regarding variance criteria two in depth. The Council noted the Staff’s conclusion that the Project would “pose significant adverse environmental impacts both to the feature and to other properties in the vicinity.” Id. at ¶ 10. The Council also made findings regarding the Staff’s conclusion that the repaired revetment would not protect the shoreline from erosion of land during storm events. See id. at ¶¶ 7-14. The Council further noted that the Staff had presented evidence that the Project was likely to endanger lives and nearby property during storm events due to its location in a flood zone and close proximity to the shoreline. Id.

Next, the Council noted that Doctors Rosen and Carchedi disagreed with the Staff’s conclusions. Id. at ¶ 15. The Council discussed the Doctors’ testimony that the Project would improve shoreline stability and that the residence would withstand storm events better than surrounding houses. Id. at ¶¶ 16, 20-24. The Council also made findings that Doctors Rosen and Carchedi had both testified that the shoreline in front of the Property was “completely stable”; however, without repairs, the revetment would fail and the Property would erode. Id. at ¶¶ 18-

20. Specifically, the Council noted that Doctor Rosen had testified that, in his opinion, “there would be no adverse environmental impacts from the project.” Id. at ¶ 24. Ultimately, after weighing the testimony of the Staff and the Mercurios’ experts, the Council found that the Project would not result in significant adverse environmental impacts. See id. at ¶ 25, 27(b)

Regarding variance criteria four, the Council found that Dr. Carchedi had testified that the “variance requested was the minimum necessary based upon, inter alia, the applicant having received relief from the [twenty-five foot] setback required by the local zoning board.” Id. at ¶ 17. As such, the Council found that the Project satisfied variance criteria four. Id. at ¶ 27(d). The Council went on to find that the Project met the four remaining variance criteria. However, the Council did not provide any factual support for its conclusions. Rather, the Final Decision contains four conclusory boilerplate statements which merely repeat the language of the variance criteria. This recital of the criteria without any supporting factual findings is insufficient for judicial review. See Bernuth, 770 A.2d at 401.

The Mercurios urge this Court to comb through the transcript of the hearing below and search for clues indicating that the Council considered all of the criteria necessary to grant a variance. However, in the absence of sufficient findings of fact, this Court “will not search the record for supportive evidence or decide for itself what is proper in the circumstances.” JCM, LLC, 889 A.2d at 177 (internal quotation marks omitted); see also Sakonnet Rogers, Inc., 536 A.2d at 897. Accordingly, this Court remands the case to the Council for further findings of fact. On remand, the Council is directed to address the specific evidence that led the Council to approve the Project and relate how the evidence meets each of the CRMP’s six variance criteria. See Kaveny, 875 A.2d at 9. Because the Court has determined that the Council’s findings of

facts are insufficient for judicial review, the Court will not reach the merits of Mr. Lebreque's remaining arguments at this time.

#### **IV**

#### **Conclusion**

After review of the entire record, this Court finds that the Council's findings of fact were insufficient to support its decision such that its decision was in violation of statutory authority. Substantial rights of the Appellant have been prejudiced. Accordingly, this Court remands the matter to the Council to make further findings of fact consistent with this Decision within sixty days of the issuance of this opinion. This Court will retain jurisdiction. Counsel shall submit the appropriate order for entry.



**RHODE ISLAND SUPERIOR COURT**

*Decision Addendum Sheet*

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**TITLE OF CASE:** **Lebrecque v. State of Rhode Island Coastal Resources Management Council, et al.**

**CASE NO:** **PC-2014-2508**

**COURT:** **Providence County Superior Court**

**DATE DECISION FILED:** **February 16, 2016**

**JUSTICE/MAGISTRATE:** **Procaccini, J.**

**ATTORNEYS:**

**For Plaintiff:** **S. Paul Ryan, Esq.**

**For Defendant:** **Brian A. Goldman, Esq.**  
**Joseph DeAngelis, Esq.**